IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

No. 69.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, *Plaintiff in Error,*

v.

PATRICK MCGUIRE AND OTHERS, *Defendants in Error.*

SUPPLEMENTAL AND REPLY BRIEF FOR DEFENDANTS IN ERROR.

Our original brief in this case was in print before we received the brief for plaintiff in error. We therefore beg to submit the following by way of supplement and reply:

I.

JURISDICTION.

Section 709, R. S. U. S., provides for three classes of cases in which this court may review on writ of error the decisions of a state court.

First. In case of any final judgment or decree, where is drawn in question the *validity* of a treaty or statute, or an authority exercised under the United States, and the decision is against their *"validity."*

Second. Where is drawn in question the validity of a statute or of an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity.

Third. Where any title, right, privilege or immunity is *claimed* under the constitution, or any treaty or statute or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity *specially set up or claimed* by either party under such constitution, treaty, statute, commission or authority.

McKenna v. *Simpson,* 129 U. S. 506.

It is, of course, entirely clear that this case does not belong to the second class. This case, if properly here, is here as belonging to the first class or to the third class, but it is entirely clear that it does not belong to the first class. There is no question here of the *validity* of a treaty or statute, or of an authority exercised under the United States. The validity of the decree of the United States Circuit Court, offered in evidence by plaintiff in error, was never disputed by any one, nor was its authority. It was conceded to be a valid decree by all par-

ties to the litigation. The only question was as to its meaning, its legal effect; that it was the decree of a court of competent jurisdiction binding all parties according to its terms, and that it imported absolute verity was and is undisputed. And the "authority" of the United States and of its court to make a binding decree in the premises was and is unquestioned and unquestionable. And the state court never questioned, much less made a "decision against its validity."

That being so, this case is eliminated from the first class as well as the second class provided for in this section of the statute. Under this provision for the first class it is not necessary that the treaty, statute or authority of the United States shall be "specially set up or claimed." And for the very sufficient reason that when a decision is made against the validity of a treaty or the validity of a statute, or the validity of an authority exercised under the United States, the federal question is necessarily involved and determined.

No court can decide that a statute and treaty or an authority exercised under the United States is invalid without deciding a federal question. But, as before stated, no decision has been made in this case touching such validity, and therefore this case is not here as one of that class.

Coming to the third class, however, we have a case the decision of which may or may not involve a federal right, and hence it is necessary, in order to bring the case within that class, that the federal right relied upon shall be, in the language of the statute, "specially set up or claimed."

In this third class the question is not of the validity of a statute or of a treaty, or of an authority, but the question is whether a party has a title or a right or a privilege or an immunity, and this he may have by vir-

tue of the constitution or statutes of the state, by virtue of the guarantees of the common law or the principles of jurisprudence, or by virtue of the guarantees of the federal constitution and laws. And, this being so, if his reliance is upon the federal law, according to the language of the statute, he must "specially set up and claim" its protection. Otherwise he might make his case in the state court on the claim of state authority, or common law authority, or the general principles of jurisprudence, and in the federal court rely wholly upon federal authority.

In other words, it seems to us plain that whenever a party is asserting a right, title, privilege or immunity under the third clause of this section in order to give this jurisdiction he must specially set up that fact. And such we understand to be the decisions of this court. Otherwise the words "claimed" and "specially set up or claimed" signify nothing.

Keeping these distinctions in view it is not difficult to classify the cases. Where the *validity* of any treaty, statute or authority exercised under the United States is involved, and the decision is against that validity, there is necessarily jurisdiction here.

Wherever, on the other hand, the question is of a title, a right, a privilege, or an immunity,—in short, where a party has a law suit that may or may not turn upon a federal treaty, statute, or authority, he must, if he would have the ultimate decision of this court, claim and specially set up that treaty, statute or authority in the state court.

Oxley Stave Co. v. *Butler County*, 166 U. S. 648;

Columbia Water Power Co. v. *Columbia Electric, etc.*, 172 U. S. 475;

Home for Incurables v. *City of New York*, 187 U. S. 155;
Layton v. *Missouri*, 187 U. S. 356;
Jacobi v. *Alabama*, 187 U. S. 133.

That no such claim was made or specially set up in the state court in this case is admitted by plaintiff in error, unless the mere fact that it deraigned title through the decree of foreclosure is such claim. But that it ***is not*** such claim has been repeatedly adjudged.

In *Bausman* v. *Dixon*, 173 U. S. 113, a receiver appointed by a federal court, against whom a judgment had been taken in a state court, attempted by writ of error to obtain a review of the judgment by this court. This court says:

"We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver the judgment against him amounts to a denial of the validity of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order."

So, in *Western Union, etc.*, v. *Ann Arbor, etc.*, 178 U. S. 239, this court denying a right of removal on account of a supposed federal question, says:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground. *Gold Washing and Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571."

Again, in *Gableman* v. *Peoria, etc.*, 179 U. S. 335, this court declared that a receiver appointed by the United States Circuit Court, in the exercise of its general equity powers, was not in the exercise of a federal authority within the meaning of the judiciary acts. On page 340 it is said:

"The question is whether the bare fact that the appointment of this receiver was by a federal court makes all actions against him cases arising under the constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that constitution or of these laws; and that his liability depends on general law, and his defense does not rest on any act of congress. We are of opinion that this question must be answered in the negative, and that this has been heretofore so determined, as the Circuit Court of Appeals properly held in this case. *Bausman* v. *Dixon*, 173 U. S. 113; *Pope* v. *Railway Company*, 173 U. S. 573; *McKenna* v. *Simpson*, 129 U. S. 506; *Provident Savings Society* v. *Ford*, 114 U. S. 635."

Again, on the next page, quoting from the opinion in *Pope* v. *Louisville, etc.*, 173 U. S. 573, it is said:

"The bill nowhere asserted a right under the constitution or laws of the United States, but proceeded on common law rights of action. We can not accept the suggestion that the mere order of a federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of Appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under the general law, and was neither created nor arose under the constitution or laws of the United States."

Exactly in point, also, is *Marrow* v. *Brinkley*, 129 U. S. 178.

In that case certain property of Parker West had been sold in 1864 under the Confiscation Act of Congress of 1862. Notwithstanding such sale, a proceeding had been taken in a state court of Virginia to subject that property, together with other property of Parker West, to the payment of his debts, and a decree had been entered against him in 1870 to that effect. In 1871 Parker West died, and in 1872 his heirs, or some of them, were made parties in the state court and a decree rendered against them.

In January, 1886, these heirs filed a bill in the State Circuit Court setting up that Parker West's title had

been divested by the sale under the Confiscation Act and that they, the heirs, never appeared in the cause in the state court either in person or by attorney; that the proceedings whereby their appearance in the cause was shown were fraudulent, and they asked to have the decree set aside as to them.

The state court ruled against them and dismissed the bill for want of equity. This decree was affirmed in the Court of Appeals of Virginia, and a writ of error sued out from this court. A motion to dismiss for want of jurisdiction was presented in this court. It was held that, notwithstanding the heirs were setting up a claim under the statute of the United States and the proceedings thereunder, yet that the decision of the state court in no way questioned the validity of that statute or any construction of it, but was based upon other grounds not involving a federal question, namely estoppel and laches, and the motion to dismiss was sustained. Just so in the case at bar, the decision of the state court was based on the insufficiency of the description of the lots, and involved no federal question at all.

All of these quotations show that to claim and specially set up a federal question much more is necessary than to merely make claim of title to property through the decree of a United States court, exercising its chancery powers in a case where its jurisdiction rests entirely on diverse citizenship.

In the decree relied upon by plaintiff in error in the case at bar no question of federal law or federal authority was involved. The jurisdiction of the United States Circuit Court for the District of Indiana in that foreclosure case rested entirely on diverse citizenship; the decree of foreclosure was made solely in the exercise of its general equity powers, and the only question mooted upon the decree in the White Circuit Court and

the Indiana Appellate Court was whether the description of the property in the mortgages and in the decree was sufficient to carry title to the town lots in dispute.

The question was and is exactly the same as it would have been if the suit for foreclosure had been in the White Circuit Court and the decree had been entered in that court, which might well have happened, since that court and the United States court had concurrent jurisdiction in the premises.

The question is not of the authority, or verity, or credit of the decree, but what is the meaning of the words used; and that meaning is the same in this as in any other decree of like character.

Indeed, as to the matter of description the United States court did not attempt to use any language except quoting from the mortgages themselves, so that the construction of the language in the descriptions in the decree is the construction of the language of the mortgages, no more and no less. (Transcript, pp. 117, 120 and 122.)

That this matter of description presents no federal question is well shown by an illustration. Suppose a decree of foreclosure in a federal court against the northeast quarter of a given section of land, and suppose that in a proceeding in a state court that decree is offered as evidence of title to the northwest quarter of the same section, would the refusal of the state court to give it effect against the northwest quarter raise a federal question?

Or, suppose the decree in the federal court described only lot one in a given town plat, and that decree was offered as evidence of title not only in lot one, but in lot two also, would the state court's confining the effect of the decree to lot one be a decision against the authority of the United States? It seems to us the proposition is wholly untenable.

But this case lacks another element essential to make a federal question. It is only where the decision is against the title, right, privilege or immunity set up or claimed that section 709 gives jurisdiction to this court. In the case at bar the decisions of the state courts not only do not deny the authority of the decree of the United States court, but expressly affirm it.

As already stated, the decree of the United States court, transcript, page 116 to 133, does not attempt to enlarge or extend the description of the mortgaged property in either of the three mortgages foreclosed. On the contrary, it simply declares (mortgage of 1886, for instance, page 117) that the mortgage "is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises, which are described in said mortgage as follows (the words party of the first part being used to designate the said defendant, Louisville, New Albany & Chicago Railway Company)." And then follows the description quoted from the mortgage, verbatim. And so with each of the other mortgages.

But, on page 125, we find that the court actually adjudged that, so far as the question here is concerned, the description of the property in the three mortgages was identically the same, and in exact accordance with this adjudication the White Circuit Court and the Appellate Court of Indiana held in the case at bar.

The language used in the decree of the United States court adjudicating the identity of the property in the three mortgages will be quoted further along in the part of this brief discussing the merits of the case. Just how the state courts deny the authority of the United States in the federal court, when it gives to the decree of the latter court precisely the same construction that that court itself gave, counsel for plaintiff in error have not explained. So much for the question of jurisdiction.

II.

Merits.

Upon the merits of this case we have very little to add to what is said in our original brief. The contention of counsel for plaintiff in error in their brief is that, while the description in the mortgage of 1886 and the description in the mortgage of 1894 may be insufficient to cover these town lots, yet the description in the mortgage of 1890 is broader and is sufficient for that purpose.

On page five of their brief counsel for plaintiff in error say:

"The description of the property covered thereby is more comprehensive in the mortgage of 1890 than it is in either the mortgage of 1886 or 1894, the description in the mortgages last mentioned, as to future-acquired property, covering not only property acquired for railroad purposes, but covering all property of every description owned by the corporation at the date of the mortgage. The mortgage of 1890 covers all property of every nature, whether owned at the date of the mortgage or not. If the claim of plaintiff in error can not be sustained under the provisions of the mortgage of 1890 it can not be sustained under the others, and it is for this reason that we have quoted liberally from the mortgage of 1890 and have not quoted from the others."

In our original brief we have set out the parts of the various mortgages which were in the state courts relied on to support the title of plaintiff in error. As heretofore stated, in the state courts it was conceded that the description in the three mortgages was substantially the same and that whatever was included in one was included in the other. But in this court, as we have stated in our original brief, the exigencies of the case have induced

counsel for plaintiff in error to set up the claim that the description in the mortgage of 1890 is broader than that in the other two mortgages and that they may maintain their title upon that description.

In view of the fact that plaintiff in error bases its entire contention upon the decree of foreclosure in the United States court, and that its insistence is that we are denying the authority of that decree, we beg to call the attention of the court and counsel to the fact that the only adjudication or construction put upon these descriptions, taken verbatim from the mortgages by the federal court, is that the three descriptions as to this property are identical.

On page 125 of the printed transcript we find the following paragraph in the decree:

"It was also further ordered, adjudged and decreed, that the premises and property covered by said mortgage, dated January 1, 1886, and said mortgage, dated May 1, 1890, and said mortgage, dated September 1, 1894, are the same and identical with the exception that said mortgage dated January 1, 1886, covers property not covered by said other mortgages, and consisting of the right, title and interest of said Orleans, West Baden and French Lick Springs Railway Company, conveyed and mortgaged by said companies to the complainants, Farmers' Loan and Trust Company and John H. Barker, as trustees, by said conveyances, dated December 12, 1896, and with the exception that said mortgage, dated September 1, 1894, covers and is a first lien on said five parcels of railroad equipment, and said other mortgages only cover and embrace the right, title and interest of the defendant Louisville, New Albany and Chicago Railway Company in and to said five parcels of railroad equipment, subject to the lien of said mortgage, dated September 1, 1894."

That is, the United States Circuit Court, by this decree, expressly adjudges that the property covered by

each of these mortgages is identically the same, no more and no less, except that the mortgage of 1886 covers a branch, namely, the Orleans, West Baden and French Lick Springs Railway Company, and the mortgage of 1894 covers certain equipment not embraced in the others.

Who is it, then, that is questioning the verity of the decree of the United States court? That decree says that the mortgage of 1890 includes nothing that is not covered by the other two mortgages. Counsel for plaintiff in error say that the mortgage of 1890 does cover these lots, which they practically admit are not covered by the other two mortgages.

We affirm the decree; they deny it.

If anything can be plain, as shown in our original brief, it is that the mortgage of 1886 and the mortgage of 1894 include only the general "lay out" of the corporation as a railway corporation. The descriptions themselves show distinctly, as we have set forth in our original brief, that such is the fact.

Counsel for plaintiff in error have not contended, and do not in their brief contend, that those two mortgages, 1886 and 1894, cover anything else; but now, contrary to the express adjudication of the United States Circuit Court in the decree foreclosing the mortgage, they attempt to assert that the description in the mortgage of 1890 is broader than those in the other two mortgages.

We concede that if in that decree the circuit court of the United States, having the matter properly before it by averments in the bill, had adjudged that this description in the mortgage of 1890 was broader than that in the other mortgages, and had adjudged as a consequence that these lots were covered, this would have been an adjudication in favor of the contention of the plaintiff in error. But, the adjudication having been made di-

rectly the other way, in a proceeding to which the grantors of the plaintiff in error were parties, we submit that that adjudication is conclusive against the plaintiff in error.

Second. But there is another reason (suggested in our original brief), why the description in the decree does not cover these lots.

The reason why property covered by a mortgage of a railroad or other similar plant as a unit may also be sold as a unit is one of necessity and public policy.

In the first place it is impossible to describe in detail such a piece of property extending hundreds of miles, with rights of way, station grounds, etc., of varying sizes, and thousands of cars, locomotives, and all the infinite variety of personal property appurtenant to such a plant.

In the second place a dismemberment of such a property and the sale of its parts separately would destroy its value to its owners and its usefulness to the public.

Hence, whatever is a part of the "lay out" of the railroad may not only be conveyed or mortgaged, but may be sold as a unit and on a general description. But as to town lots, farming lands, or other property, not a part of the railroad, not a part of the lay out, no such reason and no such rule applies. Otherwise, an unidentified farm or town lot in Steuben county and another unidentified farm or town lot in Vanderburgh county, three hundred miles apart, might be sold under the same decree.

Nor is the fact stated, that a mortgage or deed of "all" the grantor's or mortgagor's property is held to be good, of any significance.

As suggested in our original brief, a very different rule obtains as to mortgages from that which governs decrees or judgments of courts. The mortgage "of all the property" of the mortgagor is held good, upon the

principle that that is certain which can be made certain; and it is competent for the mortgagee, in his proceeding to enforce his mortgage, to allege and particularize in detail the different pieces of property that the mortgagor owned, and that he claims are covered by his mortgage, and by proper description invoke the power of the court to make the decree apply thereto. And if the court does make a decree specifically thus describing the property, the master or the sheriff who sells the property has a description by which the same can be advertised in such a manner as to make a valid sale.

But, suppose that a mortgage is made, the only description therein being "all the property of the mortgagor," and a decree of foreclosure is taken describing the property only in the same manner, namely, as "all the property of the mortgagor," would counsel for plaintiff in error, or would any one hesitate a moment in declaring the decree to be absolutely void? Would any one claim that the master appointed to make a sale, or the sheriff designated for that purpose by the statute, could advertise and sell the property by any such description?

Or, suppose, to bring the illustration still closer, that the mortgage described certain property in sufficient detail, and then by such language as is used in this mortgage, provided that it should cover all the other property of the mortgagor wherever situate; and suppose the decree of foreclosure should be taken, the description therein being in the same terms,—is it open to question that, while the decree might be good as to the property particularly described, it would be good for nothing as to what was sought to beincluded under the general language—"all the other property of the mortgagor"?

That is the situation in the case at bar according to the plaintiff in error.

The plaintiff in error is claiming a title to these lots not merely through such a decree, but through a sale based on such decree by a master upon a notice describing the property only in such general terms,—that is, all the other property of the mortgagor.

Unless, therefore, it can be maintained that the master or the sheriff, whose duty it is to make the sale, would be invested with a roving authority to go out over the country, hear evidence and hunt up and judicially determine what property the mortgagor owned, the sale must be worthless.

With the utmost confidence it is submitted that no court ever held that by such a sale title could be acquired, and until the thing is actually done we do not believe that any court ever will hold that by such a description in a decree, notice, sale and deed, any title can be acquired.

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November 3, 1904.